

Prisoner Grievances, Rights, and the Culture of Control

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I. INTRODUCTION

Prisoner grievance systems are the institutional mechanism through which prisoners can—and do—contest their conditions of confinement and exhaust internal remedies before turning to the courts for relief. To understand how the players most proximate to the grievance system think about and orient to the “appeals” process, this article draws on two sources of data: 1) face-to-face interviews with prisoners in California prisons and corrections staff charged with responding to prisoners’ grievances, and 2) a random sample of official grievances filed by prisoners and responded to by corrections staff. Our interview data reveal considerable convergences in the narratives provided by prisoners and prison staff, despite being party to an adversarial system. In sharp contrast, the written text in the formal grievances reveals very little common ground between prisoners and officials; indeed, prisoners and officials stake out their respective positions in a dispute and often talk past each other. We interpret these findings in light of a larger tension between a culture of rights and a culture of control that contextualize the institutional environment in which grievances are understood, filed, and responded to, and prisoners’ understandings of fairness are revealed. As the authors of a book on the grievance system in California prisons, *Appealing to Justice: Prisoner Grievances, Rights, and Carceral Logic*,¹ we have been asked many times some version of the same question: why do research on how prisoners

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¹ KITTY CALAVITA & VALERIE JENNESS, *APPEALING TO JUSTICE: PRISONER GRIEVANCES, RIGHTS, AND CARCERAL LOGIC* (2015).

complain about their conditions of confinement? We have also heard the colloquialisms, “If you can’t do the time, then don’t do the crime,” and “This is jail, not Yale” as a way of dismissing prisoners’ concerns about their conditions of confinement.

Juxtapose these comments against what Pulitzer Prize-winning author Kathryn Schulz recently wrote in *The New Yorker*:

Of all the liberties guaranteed by the First Amendment to the United States Constitution, the most underrated by far is the one that gives us the right to complain to our elected officials. Freedom of religion, freedom of speech, freedom of the press, freedom of assembly: all of these are far more widely known, legislated, and litigated than the right to—as the founders rather tactfully put it—“petition the Government for a redress of grievances.”²

And so it is for prisoners. They are rights-bearing subjects who can—and do—contest the conditions of their confinement just as the courts have affirmed they are entitled to do.

Consider a concrete case. In 2006, James Williams filed a grievance with the California Department of Corrections and Rehabilitation (CDCR), citing temperatures of 114 degrees in the concrete cells of the desert prison where he was held.³ He wrote that it “was ‘cruel and unusual punishment’ . . . to house people in these overheated cubicles where the only ventilation came from scorching metal vents on the roof.”⁴ He ended his grievance by noting sardonically that even the prison dog kennels were air-conditioned.⁵ The CDCR denied his appeal for remedy.⁶

The grievance system Williams used is the administrative mechanism for prisoners to contest the conditions of their confinement. As “Title 15” of the “California Code of Regulations” makes clear:

Any inmate or parolee under the department’s jurisdiction may appeal any policy, decision, action, condition, or omission by the department or its staff that the inmate or parolee can demonstrate as having a material adverse effect upon his or her health, safety, or welfare.⁷

² Kathryn Schulz, *What Calling Congress Achieves*, NEW YORKER (Mar. 6, 2017), <http://www.newyorker.com/magazine/2017/03/06/what-calling-congress-achieves> [https://perma.cc/77KF-B94Q].

³ CALAVITA & JENNESS, *supra* note 1, at 1.

⁴ *Id.*

⁵ *Id.*

⁶ *Id.*

⁷ CAL. CODE REGS. tit. 15, § 3084.1(a) (2017).

The Prison Litigation Reform Act (PLRA), enacted in 1996, required exhaustion of this internal process before prisoners can gain access to court and have their concerns heard in that institutional venue.⁸

In California, this internal process includes the use of a “602” on which prisoners write down their grievance.⁹ The number 602 refers to the number on the official form that allows prisoners to state the nature of their grievance.¹⁰ Once completed, the prisoner puts the form in the locked grievance box located in or near each housing unit (i.e., each cellblock, dorm, special housing unit, etc.).¹¹ It is then retrieved by prison officials, and reviewed for adjudication and responded to in writing by CDCR officials.¹² It can proceed through four levels of review, all of them conducted exclusively by the CDCR.¹³ It is not surprising that Williams’ grievance was denied along with tens of thousands of other grievances in the same year and every year thereafter.¹⁴ After all, the Corrections Department is defendant, judge, and jury of complaints against it, and the vast majority of appeals are denied.¹⁵ This is the case in other states as well.¹⁶

In *Appealing to Justice*, we focused on this grievance system for multiple purposes. First, we treat it as a window into prison conditions and daily prison life at a time when in-prison research is sorely lacking.¹⁷ Getting inside to interview prisoners and staff and getting access to thousands of actual grievances was one way to document the usually invisible prison experience and its institutional dynamics.¹⁸

Our second goal in the larger research project from which this article derives was to study the grievance process for what it is—a kind of disputing in a highly hierarchical context.¹⁹ There is considerable scholarship on disputing and other forms of legal mobilization, and our work is the first systematic large scale empirical study of disputing in prison. We turned up some pretty counter-intuitive findings about the context in which this disputing unfolds, how it is structured and

⁸ Prison Litigation Reform Act of 1995, 42 U.S.C. § 1997e (1996); Margo Schlanger & Giovanna Shay, *Preserving the Rule of Law in America’s Jails and Prisons: The Case for Amending the Prison Litigation Reform Act*, 11 U. PA. J. CONST. L. 139, 147 (2008).

⁹ Inmate/Parolee Appeal CDCR Form 602 (Rev. 08/09); CALAVITA & JENNESS, *supra* note 1, at 33.

¹⁰ CALAVITA & JENNESS, *supra* note 1, at 33.

¹¹ *Id.* at 36, 189.

¹² *Id.* at 34.

¹³ *Id.* at 1, 33–36.

¹⁴ *Id.* at 1.

¹⁵ *Id.*

¹⁶ *Id.* at 31–32.

¹⁷ *Id.* at 1.

¹⁸ *Id.* at 2.

¹⁹ *Id.*

operates on the ground, and the consequences of its presence and functioning in prison—for both staff and prisoners.

One set of puzzling findings that we will focus on here concerns the convergences and disconnects in the prisoner and staff interviews and in the grievances, as compared to the written grievances themselves. By focusing on this, we can understand the larger cultural context in which prisoners think about grievances, “fairness” in the criminal justice system in general and with regard to the grievances in particular, and what both reveal about larger structural and cultural forces at work. Before turning to our analysis, in the next section we briefly discuss our approach to data collection and the nature of our data.

II. CONTEXT AND DATA COLLECTION

When we began this research in 2007, California was home to one of the largest correctional systems in the western world, surpassed only by the U.S. federal system.²⁰ In addition to its mammoth size, the CDCR is by many accounts a dysfunctional organization. The year before we committed to doing the research reported in *Appealing to Justice*, U.S. District Court Judge Thelton Henderson put the California prison health care system in receivership, having found that its conditions violated the Eight Amendment prohibition of cruel and unusual punishment.²¹ At the time, no one contested that prison conditions were problematic. It was in this context that we became interested in understanding how prisoners contest their conditions of confinement in a post-PLRA era and at a time when criminologists and other social scientists were rightly observing that the “golden age” of in-prison research had come and gone.

To understand the inmate grievance system and the nature of the back and forth between prisoners and CDCR personnel, as well as the institutional logics it implicates and the outcomes it produces, we collected multiple types of data. We first collected a random sample of 292 grievances that came from men’s prisons in 2005-06.²² After collecting these, we identified the prisoners that filed those 292 and then pulled all of their other grievances files in the same year—what we called “accompanying files”—in order to look at the pattern of filing across the same prisoner. In addition, because fully granted appeals are so rare, we included all grievances that were granted at the final level of review that originated in men’s prisons (n=37).²³

Second, in 2009 we conducted face-to-face interviews with both prisoners and CDCR staff. We interviewed a random sample of forty men from each of three prisons that together approximate the characteristics of the larger CDCR male

²⁰ *Id.* at 5.

²¹ *Plata v. Schwarzenegger*, No. C01–1351 TEH, 2005 WL 2932253 (N.D. Cal. Oct. 3, 2005).

²² CALAVITA & JENNESS, *supra* note 1, at 11.

²³ *Id.*

population on several important dimensions.²⁴ We interviewed twenty-three CDCR personnel, including wardens, deputy wardens, captains, appeals coordinators, grievance examiners, and supervisors.²⁵ With the exception of a few interviews with appeals examiners that were conducted in offices in Sacramento, the interviews were done in prisons and included both closed and open-ended questions, and allowed for follow-up questions and spontaneous exchanges. We conducted all of the staff interviews and the vast majority of the interviews with prisoners, and three advanced graduate students conducted the others.²⁶

We kept these interviews conversational. Not infrequently, we had to abandon the orderly sequence of questions on our interview instrument when our respondents took discursive detours and side trips, as we balanced the need to be systematic with the desire to keep the tone conversational—a chronic challenge of the semi-structured interview. During our interviews, we often got the sense that the prisoners and staff alike were patiently schooling us in the experiential aspects of prison and the intricacies of the grievance system.²⁷ We were no doubt correctly perceived by those we interviewed as “outsiders,” neither prisoners nor corrections personnel; tellingly, prisoners referred to us as “soft in the hands,” “professors,” “researchers,” “outside people,” and “somebody on the outside.”²⁸ In this context, it was not unusual for the prisoners we interviewed to offer apparently candid expressions of anger (“It’s like we’re on the front lines in Iraq”), remorse (“I was very foolish for what I did”), resentment (“I’m locked in a cage!”), and emotional vulnerability (“I have to deal with my own heartache”).²⁹ Despite our initial concerns that prisoners would be reluctant to participate or would hesitate to speak to us in anything but the most guarded fashion, the vast majority readily agreed to participate and with few exceptions agreed to be tape recorded. In fact, many of these men told us that it meant a lot to them to be able to tell their stories.

Likewise, staff often spoke to us in ways that seemed unguarded, revealing things and employing ways of speaking that indicated they were not apprehensive or withholding.³⁰ We were often struck by their willingness to be candid in the interviews—a sense that was confirmed when former prison officials, upon reading *Appealing to Justice*, expressed surprise at the candor reflected in staff quotes. The interviews with staff, which were not recorded as per agreement with the CDCR, often lasted three hours or more and ended only when we needed to move

²⁴ *Id.* at 8.

²⁵ *Id.*

²⁶ *Id.* at 9.

²⁷ *Id.* at 10.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.* at 10–11.

on.³¹ These officials were so generous with their time that it frequently seemed they were willing to talk with us as long as we would listen.³²

Collecting the interview data was as exhausting as it is valuable. It was exhausting, in large part, because of the time it took to get the necessary approvals to collect the data. Data collection took three years, from the time we initiated the project to the time data collection concluded; however, completing the 143 interviews only took a few months.

The willingness of both prisoners and CDCR personnel to spend hours discussing their roles in the grievance process, their judgments of its effectiveness and fairness, their opinions about prisoner appellants, and their experiences with other institutional actors—sometimes in remarkably candid terms—proved worthwhile. It resulted in the many findings and analyses presented in our book, including those we present here.

III. FINDINGS AND ANALYSIS

Our data generated some surprising findings. As we analyze in our book, these highly stigmatized and vulnerable prisoners file claims by the tens of thousands every year despite their fears of retaliation.³³ Almost three-quarters of the prisoners we interviewed had filed at least one grievance.³⁴ As reported in Table 1, the most frequent issues referred to in prisoner grievances are medical care, disciplinary actions, property damage or loss, disability accommodations, programming and work issues, and complaints against staff.³⁵ The fact that so many prisoners file grievances despite their fears of retaliation contradicts one of the key findings of previous studies about legal mobilization, namely that the disempowered or stigmatized are unlikely to name, blame, and claim.³⁶ That is, they are less likely to move up the “pyramid of disputes.”³⁷

As we examined our data, it soon became clear that if we wanted to make sense of our findings, we had to look at the bigger picture this grievance system is part of. In broad outline, it’s a picture of a late-modern society that has expanded civil and legal rights, yet deprives people of their liberty on an unprecedented scale. This “civil rights society” embraces the rhetoric of rights, but at the same time has taken a pronounced punitive turn that, by 2008, left approximately one in

³¹ *Id.* at 11.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 63.

³⁵ *See infra* Table 1.

³⁶ CALAVITA & JENNESS, *supra* note 1, at 52 (discussing William L.F. Felstiner et al., *The Emergence and Transformation of Disputes: Naming, Blaming, Claiming...*, 15 LAW & SOC’Y REV. 631 (1980–81)).

³⁷ *Id.* (discussing Ethan Michelson, *Climbing the Dispute Pagoda: Grievances and Appeals to the Official Justice System in Rural China*, 72 AM. SOC. REV. 459, 460 (2007)).

100 people in the U.S. behind bars.³⁸ The logic of rights and the logic of control are now among the defining ideologies of American society, permeating institutions both large and small.

These logics are compellingly documented and analyzed in Bumiller's book on *The Civil Rights Society* and Garland's book on *The Culture of Control*, to name just two important pieces of work.³⁹ These defining logics sit side-by-side, overlap, and tug against each other. Most relevant for our purposes here, their underlying philosophies are in tension—with one espousing individual agency and freedom from discrimination and oppression of all kinds, and the other providing the cultural cover—the need for control—to justify holding millions of people in captivity. Whatever the reason for this simultaneous emergence of a culture of rights and a culture of control, they have set in motion a seismic tension that reverberates throughout society and is found in its most primal form in the contemporary prison.

The inmate appeals system sits at the fault line of these institutional logics. It simultaneously embodies these conflicting logics of rights and control. As a result, we see both convergences and disconnects in the talk of prisoners and officials and in the written grievances.

When we began this research, we expected to find the adversarial nature of prison reflected in very different accounts of prison life from prisoners versus corrections officials; after all, for decades prison researchers have documented the adversarial dynamics in what Sykes called a “society of captives” in his canonical work.⁴⁰ We did find this over and over again. However, what *surprised* us was conflicting narratives within the same person's interview. For example, a prisoner might tell us that the whole system is rigged and “a joke” and the guards are on a power trip, but in the next breath would say that most guards are “cool,” that “the law is the law,” and that prison is supposed to be hard.⁴¹ The result was not only the expected adversarial disconnect between prisoners' and officials' narratives, but periodic parallels between human dignity and civil rights and a culture of control.

A few examples of what we heard as we talked with—and more importantly listened to—prisoners and CDCR officials, read in tandem, are illustrative.

³⁸ *Id.* at 3, 12–19.

³⁹ KRISTIN BUMILLER, *THE CIVIL RIGHTS SOCIETY: THE SOCIAL CONSTRUCTION OF VICTIMS* (1988); DAVID GARLAND, *THE CULTURE OF CONTROL: CRIME AND SOCIAL ORDER IN CONTEMPORARY SOCIETY* (2001).

⁴⁰ GRESHAM M. SYKES, *THE SOCIETY OF CAPTIVES: A STUDY OF A MAXIMUM SECURITY PRISON* (1958).

⁴¹ CALAVITA & JENNESS, *supra* note 1, at 60–61, 81–82, 92.

A. What the Prisoners Told Us

Prisoners routinely spoke in terms of human dignity, entitlement, and rights while also talking about the culture of control as a legitimate institutional force. For example, a prisoner spoke of the horror of CDCR staff's disregard for prisoners' health and welfare through a graphic example:

A mobile home ran into the state bus [we were being transferred in] and the bus flipped over. I fractured my collarbone, injured my spine, broke two of my teeth right here. . . . They had me sitting here for like a whole two weeks after knowing that I was injured. You could see my bone up here, my collarbone. I couldn't bend over. My lip was slit right here.⁴²

In contrast, another prisoner explained the harshness of captivity as acceptable by referencing the legitimacy of punishment: "This is a prison and it's not Disneyland. They're not here to make you comfortable. We did a crime and this is what we get."⁴³

In another set of reports, one prisoner describes prison life as routinely humiliating. He explained a routine feature of prison life as follows:

They would have us come out of our cells And, then they'll have us lined up, like ten guys in a row. They'll strip us out, buck naked, and say, 'Bend over and cough.' . . . Every day, if you wanted to go to the yard, you had to be strip-searched, bend over, and cough, in front of female officers and everything.⁴⁴

And yet another made sense of routine prison practices as follows: "[Some problems are because of] security issues, because they have to have some kind of controlled movement."⁴⁵

Commenting more generally on CDCR staff and prisons, a prisoner portrayed the "guards" and the carceral environment his way:

This place is a joke. . . . They give these people too much power over you, over your life, your freedom. They got these power-tripping people [guards] that need psychological evaluations . . . because they're the guys that got their lunch money taken in elementary school and now they're getting back on people.⁴⁶

⁴² *Id.* at 58.

⁴³ *Id.* at 92.

⁴⁴ *Id.* at 60.

⁴⁵ *Id.* at 92.

⁴⁶ *Id.* at 60–61.

In contrast, another prisoner said simply, “we’re in *prison*. If you don’t like it, don’t come back, you know?”⁴⁷

In a similar vein, a prisoner explained the unnecessary harshness of prison life as akin to being in a battlefield. He claimed to have seen: “COs that pulled [a] guy out of the cell, handcuffed him, and just started beating him. . . . They had handcuffs on him, knocked him out cold on the ground. . . . It’s like we’re on the front lines in Iraq, you know?”⁴⁸ Juxtapose that with what another prisoner reported about the nature of state sanctioned punishment: “we’re in here because we’re being punished . . . this is our punishment. Our rights are taken away in here for certain things. The minute I came to prison I fully understood that.”⁴⁹

As a final example, a prisoner commented that he and others are treated like animals with no regard for their welfare: “They treat us like . . . we’re a bird in a cage. You know? And, they just get to open us up, or do whatever they want with us. Tell us when to do this and when to do that . . . there’s no reason you should be treated like this, you know?”⁵⁰ On the other hand, a prisoner explained succinctly that “[t]he officers here, they have to run a program too and to have a controlled environment.”⁵¹

B. *What the Staff Told Us*

Like the prisoners, the staff spoke in terms that exemplified the tension between a civil rights society and a culture of control. With specific reference to the right to file grievances, for example, a state official said: “My job is to make sure inmates are afforded an opportunity to be heard.”⁵² In sharp contrast, in one of the most hostile exchanges in our interviews, another staff expressed considerable resentment for what s/he perceived as the unwarranted entitlements associated with being a prisoner: “If there’s a three-hundred-pound black inmate who complains he doesn’t have enough toilet paper . . . I don’t want to deal with toilet paper to clean his fat ass.”⁵³

In a similar comparison, another CDCR staff person said, “[Appeals are] an individual’s opportunity to express, in written form, anything that may be adverse to them.”⁵⁴ His/her colleague had a decidedly different point of view: “You know, it’s [filing grievances is] a scam for them.”⁵⁵ Similarly, another staff person said,

⁴⁷ *Id.* at 93.

⁴⁸ *Id.* at 61.

⁴⁹ *Id.* at 93.

⁵⁰ *Id.* at 61.

⁵¹ *Id.* at 91.

⁵² *Id.* at 100.

⁵³ *Id.* at 105.

⁵⁴ *Id.* at 100.

⁵⁵ *Id.* at 105.

“[t]hey have a *right* to file,”⁵⁶ while his/her colleague explained how filing creates an unwarranted burden for the state:

Inmates have too many hoops they make us jump through, and they don’t have to jump through any hoops. The inmate should have to jump through hoops! . . . I’d say California jumps through a zillion damn hoops to make sure they’re happy campers. This isn’t Carl’s Jr. and [you don’t get to] “have it your way.”⁵⁷

In agreement, another CDCR staff said: “There is some truth to each one of these [grievances]. . . . But, *it’s no fun in prison. You came here, get over it.*”⁵⁸

As a final set of revealing examples, some CDCR staff spoke explicitly of prisoner’s rights. A staff member said it simply: “[i]nmates can, do, and should have rights.”⁵⁹ Yet, often staff also were quick to indicate that the CDCR does not violate prisoners’ rights: “We very seldom violate their constitutional rights. . . . I tell them, ‘You’ve got your Title 15 rights and *not one second more*. You’ve got this coming and not one second more.”⁶⁰ Finally, another staff member we interviewed expressed a complicated view of rights: “They should have rights. I guess we could debate which rights endlessly. . . . We’re just trying to ensure the rules . . . are implemented. *We’re also trying to go home alive.*”⁶¹

The gist of these quotes and many others is this: CDCR staff lauded the grievance system as “a way of giving voice to people it matters to,” as “an informational tool,” and as a hedge against legal liability; and they emphasized that prisoners “have a *right* to file,” that “we make mistakes,” and that “we’re human, they’re human.”⁶² At the same time, these affirmations of prisoners’ rights and of their humanity were laced with potent counter-themes of hostility towards prisoners who exercise their rights, the perception that rights have “gone too far,” and the view that the “operational realities” of running a prison “can trump” prisoner rights.⁶³

These conflicting comments sometimes came from different people, but just as often they were spoken in one breath by the same respondent. Also, to be clear: these narratives are presented in a symmetrical fashion, but that is not meant to imply prisoners and CDCR staff are on equal footing; it is the prisoners who are behind bars and the CDCR staff who go home at the end of a shift.

⁵⁶ *Id.* at 100.

⁵⁷ *Id.* at 107.

⁵⁸ *Id.* at 110.

⁵⁹ *Id.* at 100.

⁶⁰ *Id.* at 107.

⁶¹ *Id.* at 111.

⁶² *Id.* at 99–103, 183.

⁶³ *Id.* at 106–107, 110, 112, 183.

Stepping back from the particulars of any given quote, the larger point is clear: these prisoners and their keepers are drawing their views from the American cultural toolkit.⁶⁴ Their conflicting narratives of rights on one hand and control on the other are not so much confused, as they are part and parcel of the defining ideologies of our age. Both prisoners and staff articulate these dominant themes of the larger ideological context, as they both simultaneously affirm the validity of prisoners' rights and the legitimacy of punishment and control.

C. What the Official Grievances Tell Us

Many socio-legal scholars have documented how language in a legal context is a weapon in the struggle to construct meaning.⁶⁵ With this in mind, we systematically coded for the frames that prisoners and officials used in their written grievances across four levels of review. Tellingly, what we found here is the opposite of what we found in the interview data. Instead of the discursive convergences found in the interviews, the written text in the formal grievances reveals very little common ground between prisoners and officials. In the written grievances, prisoners and officials stake out their respective positions on either side of this rights/control tension and stay entrenched, with prisoners asserting rights and officials pushing back by asserting control.

A comparison of the findings presented in Table 2 and Table 3 reveals that the primary frames used by prisoners in written grievances range more widely than the primary frames used by the CDCR staff in their responses to prisoners in written grievances.⁶⁶ Four frames—legalist/legal rights, needs, accountability, and procedural justice—account for approximately 70% of the frames used by prisoners across four levels of review.⁶⁷ In contrast, two frames—legalistic and bureaucratic frames—describe at least 80% of CDCR responses at all levels of review.⁶⁸ In addition, when we read through all these grievances, we were struck by the complete absence of anything you could call a “dialogue,” which is how disputes have sometimes been characterized in the literature.⁶⁹ What we see here is two parties using very different languages and syntaxes of meaning; this is in juxtaposition to what we find in the interview data—that prisoners and staff use similar languages to provide diagnoses and prognoses of prison life, especially prisoners' use of the grievance system.

⁶⁴ Ann Swidler, *Culture in Action: Symbols and Strategies*, 51 AM. SOC. REV. 273 (1986).

⁶⁵ See GEORGE I. LOVELL, THIS IS NOT CIVIL RIGHTS: DISCOVERING RIGHTS TALK IN 1939 AMERICA (2012); BARBARA YNGVESSON, VIRTUOUS CITIZENS, DISRUPTIVE SUBJECTS: ORDER AND COMPLAINT IN A NEW ENGLAND COURT (1993).

⁶⁶ See *infra* Table 2 & Table 3.

⁶⁷ See *infra* Table 2.

⁶⁸ See *infra* Table 3.

⁶⁹ SALLY ENGLE MERRY, GETTING JUSTICE AND GETTING EVEN: LEGAL CONSCIOUSNESS AMONG WORKING-CLASS AMERICANS 93 (1990).

Consider as an example one of the many prisoners who used a needs frame to make his case. Joseph Sonora was worried because he was scheduled to be transferred to a prison far away from his elderly mother.⁷⁰ He described his problem in plain, heartfelt language:

My mother is 73 years old, in poor health . . . and I am her only child and the reason she is able to stay alive & strong. My father passed away in [date] and my mom has been alone ever since. She is very dedicated towards me and me towards her. The only thing in life that keeps us both going is the ability to spend those precious Sundays together. Moving me away up north would severely limit her ability to visit me and would devastate her emotionally. I plead with you to consider my family ties and that transferring me elsewhere would cause an unusual hardship upon my mother, who I love & care for so very much.⁷¹

In response to his plea, the first-level denial was comprised of two brief sentences, and concluded with: “Due to population pressures the CSR [Classification Staff Representative] endorsed you to [transfer prison] consistent with your classification score.”⁷² At no point in any of the four official responses was there any reference to the impact of a transfer on family visits. Such disconnects occurred over and over again throughout the hundreds of grievances we coded, regardless of the issue identified by the prisoner in the written grievance.

Even when both sides appeared to use a legalistic frame, they spoke in different dialects. Prisoners spoke of constitutional rights, while officials quoted from the California Code of Regulations governing prisons, their policy and procedures manuals, and local administrative memos. For example, a group of prisoners housed in a converted gym with triple-decked bunks filed an appeal contesting overcrowding and its effects on ventilation, violence, sanitation, and noise.⁷³ They argued that these conditions amounted to cruel and unusual punishment. Their appeal was screened out at the first level because the CDCR said it “covers too many complexed issues.”⁷⁴ When the appellants then explained that the single overarching issue was overcrowding, the institution reverted to a recitation of policy, interspersed with references to administrative-bureaucratic concerns: “[i]t appears that no violation of Department rules, regulations, or policies has occurred. Housing capacity is the CDCR’s system-wide bed count utilizing occupancy standards, classification levels, special housing designations, and the institution’s program needs.”⁷⁵ Further, the final review indicated that the

⁷⁰ CALAVITA & JENNESS, *supra* note 1, at 165.

⁷¹ *Id.*

⁷² *Id.* at 167–68.

⁷³ *Id.* at 170.

⁷⁴ *Id.*

⁷⁵ *Id.*

prisoners had not presented “any evidence or documentation” that they had “suffered adversely.”⁷⁶

These written grievances present a radical contrast to the moments of convergence that surfaced in our interviews. Gone is any indication that these two sides inhabit the same cultural world. Instead, prisoners’ and officials’ grievance narratives are the split-screen version of the rights and control contradiction. This is probably understandable given the highly adversarial context of an official dispute in prison.

IV. ANALYZING FAIRNESS IN THE ADVERSARIAL CONTEXT OF PRISON

In other work that we can only sketch briefly here, we focus on how prisoners perceive fairness in this context, once again turning up some counter-intuitive findings.⁷⁷ For one thing, despite the adversarial environment of prison, a significant minority of these prisoners thought the system had been fair to them. When asked, “Looking back over your experiences in life and things you’ve done, do you think you’ve been treated fairly by the criminal justice system,” 43% of males said they had.⁷⁸ For example, a prisoner who was thirteen years old the first time he was arrested, fourteen when he was put in juvenile detention, and in his late twenties when we interviewed him, told us he had been treated more than fairly:

[I base] that on a lot of stuff that I’ve done, [and] the criminal justice system . . . gave me opportunities and . . . like, for example, I got possession of a controlled substance for sale while armed . . . and instead of sending me to prison right away, they give me opportunities, [an] occupation, Prop 36 [a drug diversion program], drug programs that are actually helping my addiction, and yeah dude, that’s how . . . they give me chances and opportunities. . . . I’ve had a lot of chances, a lot of chances.⁷⁹

Similarly, another prisoner said he had been treated fairly: “I coulda got a lot more time, but I feel like I was treated fairly. For the crime that I committed, they gave me eight years. I think I was treated fairly.”⁸⁰

Many others reported that they had been treated fairly because they were being punished for the crime they committed and that they deserved to be in prison. A prisoner on a Sensitive Needs Yard (SNY), said, “we’re in here because

⁷⁶ *Id.* at 43.

⁷⁷ Valerie Jenness & Kitty Calavita, “*It All Depends on the Outcome*”: Prisoners, Grievances, and Perceptions of Procedural Justice, 51 *LAW & SOC’Y REV.* (forthcoming 2017).

⁷⁸ CALAVITA & JENNESS, *supra* note 1, at 81.

⁷⁹ *Id.*

⁸⁰ *Id.*

we're being punished . . . this is our punishment. . . . The minute I came to prison I fully understood that.”⁸¹ Another prisoner, a Vietnam Veteran diagnosed with post-traumatic stress disorder who had been in prison for twenty-eight years when we interviewed him, also told us he had been treated fairly: “Yes. I killed two people. I got two life sentences. I don’t like it, but I was found guilty, and actually two 15-to-life sentences is better than two 25-to-lives.”⁸² And as a final example, a man in prison for robbery put it this way: “Yeah. I think I’ve been treated fairly because I’ve never just been put in prison or in jail for no reason at all . . . I’ve done things to be put in prison.”⁸³

In addition to our finding that a significant minority of these men said they had been treated fairly, we also found that contrary to what one would expect from the procedural justice literature,⁸⁴ very few of the men we interviewed referred to procedural justice. Even though most of them focused on their arrest, prosecution and sentence, they rarely made reference to issues of due process during trial, getting their say before a neutral court, or any of the other dimensions of procedural justice so often cited in the literature as paramount to people’s satisfaction. Instead, they often invoked an assessment of whether the *outcome* (usually, their sentence) had been fair.

Similarly, when asked about their satisfaction with the grievance system, it was the outcome (whether a grievance was granted) that mattered most.⁸⁵ As we argue in detail elsewhere, contrary to the primacy accorded to process in most studies of procedural justice, actual outcome is the most important ingredient in these prisoners’ sense of fairness.⁸⁶

Beyond these specific findings, what we see more broadly is the power of institutional and structural context to shape this fundamental concept of fairness, a concept that plays a significant role in modern social, economic, and political institutions. Children at a young age communicate a desire for things to be “fair,” often expressing their indignation when they perceive unfairness (“That’s not fair!”). As adults, we contest unfairness as a violation of a core—some would say

⁸¹ *Id.* at 93.

⁸² Prisoner Interview (2009) (on file with author).

⁸³ *Id.*

⁸⁴ As Baker and his colleagues describe it, the procedural justice literature advances the notion that: “*how* a decision is made may be as important to individuals as the actual decision. . . . Research suggests even when negative outcomes occur the individual may be more . . . satisfied with the results and the decision makers if the *process* is viewed as equitable.” Thomas Baker et al., *Shared Race/Ethnicity, Court Procedural Justice, and Self-Regulating Beliefs: A Study of Female Offenders*, 49 LAW & SOC’Y REV. 433, 435–36 (2015). Tyler and his colleagues have gone even further, reporting that “perceived procedural justice” is “*the* most important observed element” in affecting people’s satisfaction with official encounters. Tom R. Tyler et al., *Street Stops and Police Legitimacy: Teachable Moments in Young Urban Men’s Legal Socialization*, 11 J. EMPIRICAL LEGAL STUD. 751, 775 (2014) (emphasis added).

⁸⁵ Calavita & Jenness, *supra* note 77.

⁸⁶ *Id.*

universal—shared value.⁸⁷ Some evolutionary biologists speak of “fairness” as an instinct. Honick and Orians argue that, instinct or not, “[w]e apparently begin with fairness as our default position. We’re surprised and affronted when we first face a situation that seems unfair It seems we’re predisposed to prefer and expect fairness.”⁸⁸ No wonder parents tell their children to “play fair,” politicians routinely reference fairness as a justification for policy and practice, and most importantly for our purposes here, the promise of American law is consistently anchored in notions of fairness as a route to justice. This basic truism is central in the lives of all of us, and perhaps even more so in the lives of the over two million people behind bars.⁸⁹

While fairness is a fundamental concept in all aspects of social life, our work on prisoners’ perceptions of fairness reveals the power of institutional and cultural context to shape its meaning. Much as the prisoner and staff narratives described earlier reflect the broader American cultural toolkit, so too these prisoners’ concern for fairness draws from the larger cultural landscape. But, just as the prisoner and staff narratives reflecting the rights/control tension shift from one structural location to another (e.g., from the informal interviews to the formal written grievances), perceptions of fairness—and the relative primacy of procedural justice versus substantive justice—appear to be dependent on context. It is hard to conjure up a more extreme context than prison. In this harsh and adversarial environment, it is perhaps not surprising that these men prioritize outcomes over process, just as they insisted on their rights in their written grievances but gave a nod to the demands of control in our interviews with them. In other words, context matters. These incarcerated men’s attitudes reflect the broader American culture, but—as with all of us—they draw on its principles selectively according to the context and their particular location in it.

⁸⁷ Amitai Etzioni, *The Fair Society*, in *UNITING AMERICA: RESTORING THE VITAL CENTER TO AMERICAN DEMOCRACY* 211 (Norton Garfinkle & Daniel Yankelovich eds., 2005).

⁸⁸ Alan Honick & Gordon Orians, *Are We Born with a Sense of Fairness?*, PAC. STANDARD (Dec. 26, 2012), www.psmag.com/books-and-culture/are-we-born-with-a-sense-of-fairness-50925 [<https://perma.cc/5Q9E-DBMC>].

⁸⁹ CALAVITA & JENNESS, *supra* note 1, at 15.

Table 1. Types of Grievances as Categorized by the CDCR, 2005–06^{*90}	
Medical	58 (19.9%)
Disciplinary	51 (17.5%)
Property	24 (8.2%)
ADA	22 (7.5%)
Program/Work Incentive*	20 (6.8%)
Complaints Against Staff	18 (6.2%)
Mail	17 (5.8%)
Custody/Classification	15 (5.1%)
Case Information/Record	15 (5.1%)
Living Conditions	14 (4.8%)
Transfers	13 (4.5%)
Funds	8 (2.7%)
Visiting	7 (2.4%)
Legal	5 (1.7%)
Segregation	4 (1.4%)
Reentry	1 (0.3%)
Total	292 (100%)

Source: Inmate Appeals Office, California Department of Corrections and Rehabilitation.

* The CDCR recognizes “program” and “work incentive” as separate classifications. However, they are combined here for presentation purposes and because they are combined in the classification scheme used in this research.

⁹⁰ See CALAVITA & JENNESS, *supra* note 1, at 39.

Table 2. Primary Frames Used by Prisoners to Articulate Grievances* ⁹¹				
Type of Frame	Informal Level	1st Level**	2nd Level	3rd Level
Legalistic/legal rights	86 (30.8)	27 (25.0)	36 (19.7)	74 (26.2)
Needs	71 (25.4)	34 (31.5)	49 (26.8)	57 (20.2)
Accountability	31 (11.1)	16 (14.8)	42 (23.0)	55 (19.5)
Procedural justice	28 (10.0)	2 (1.9)	6 (3.3)	32 (11.3)
Fairness	21 (7.5)	12 (11.1)	15 (8.2)	19 (6.7)
Discrimination	13 (4.7)	2 (1.9)	9 (4.9)	18 (6.4)
Deservedness	8 (2.9)	3 (2.8)	3 (1.6)	3 (1.1)
Mistake made	7 (2.5)	5 (4.6)	5 (2.7)	8 (2.8)
Safety	4 (1.4)	0 (0.0)	2 (1.1)	4 (1.4)
Compassion	4 (1.4)	2 (1.9)	3 (1.6)	5 (1.8)
Human rights	2 (0.7)	0 (0.0)	1 (0.5)	1 (0.4)
Importance of principle	2 (0.7)	3 (2.8)	10 (5.5)	4 (1.4)
Other	2 (0.7)	2 (1.9)	2 (1.1)	2 (0.7)
Total	279	108	183	282

* The data presented in this table include raw counts and valid percentages (in parentheses) based on the 292 grievances in the random sample. Cases with missing data (usually because of review bypasses) are excluded.

** When a grievance bypassed the informal level response from the CDCR, the appellant did not write a first-level narrative because there was nothing at that level for him to respond to. Hence, the number of first-level prisoner narratives entered here is fewer than at other levels.

⁹¹ *Id.* at 154.

Table 3. Primary Frames Used by CDCR Officials to Respond to Prisoners' Grievances* ⁹²				
Type of Frame	Informal Level	1st Level**	2nd Level	3rd Level
Bureaucratic	48 (47.5)	60 (34.3)	103 (35.9)	108 (38.4)
Legalistic/policy	41 (40.6)	83 (47.4)	126 (43.9)	131 (46.6)
Medical expertise	4 (4.0)	9 (5.1)	8 (2.8)	11 (3.9)
Other	3 (3.0)	13 (7.4)	30 (10.5)	16 (5.7)
Needs	2 (2.0)	1 (0.6)	0 (0.0)	0 (0.0)
Safety/security	2 (2.0)	5 (2.9)	10 (3.5)	9 (3.2)
Budget	1 (1.0)	1 (0.6)	1 (0.3)	2 (0.7)
Human mistake	0 (0.0)	2 (1.1)	0 (0.0)	0 (0.0)
Logic/reason	0 (0.0)	1 (0.6)	4 (1.4)	3 (1.1)
Overcrowding	0 (0.0)	0 (0.0)	5 (1.7)	1 (0.4)
Total	101	175	287	281

* The data presented in this table include raw counts and valid percent (in parentheses) based on the 292 grievances in the random sample. Cases with missing data (usually because of review bypasses) are excluded.

** The number of informal responses entered here is fewer than at other levels because this level was often bypassed.

⁹² *Id.* at 159.